

## **House Committee on Veterans' Affairs**

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Testimony Before the Subcommittee on Disability Assistance & Memorial Affairs of the House  
Committee on Veterans' Affairs

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Chairman Hall, Members of the House Subcommittee on Disability Assistance & Memorial Affairs, and honored guests:

On behalf of myself and those others involved in the Veterans Law Project, which I direct, I wish to express our great appreciation for the Subcommittee's holding today's important hearing on House Bills H.R. 67, H.R. 1435, H.R. 1444, and H.R. 1490. We truly value this opportunity to present our position on these proposed pieces of legislation that are intended to provide appropriate benefits to the millions of veterans who have served our great nation.

I want to thank Chairman Hall for introducing H.R.1444, his proposed legislation to "Direct the Secretary of Veterans Affairs to make interim benefit payments to veteran claimants under certain remanded claims"; Representative McIntyre for introducing H.R. 67, the proposed "Veterans Outreach Improvement Act of 2007"; Representatives Donnelly and Upton for introduction of H.R. 1490, their proposed legislation to "Provide for a presumption of service-connectedness for certain claims for benefits under the laws administered by the Secretary of Veterans Affairs"; and Representative Baca for introducing H.R. 1435, his proposed legislation to "Direct the Secretary of Veterans Affairs to conduct a pilot program to reduce the backlog of claims for benefits pending with the Department of Veterans Affairs". These legislative initiatives are great examples of keeping faith with the millions of veterans to whom the Nation has a sacred obligation.

The Veterans Law Project does not receive any grants, or contracts from the federal government.

### **OVERVIEW OF THE VETERANS LAW PROJECT AT NORTH CAROLINA CENTRAL SCHOOL OF LAW**

The Veterans Law Project, which has not received any grant or contract from the federal government, is a followup to a 1991 American Bar Association study. That study showed that veterans who had disability claims and whose income was less than \$50,000 were more likely to represent themselves in the Court of Veterans Appeals once they had received an adverse ruling by the Board of Veterans' Appeals (BVA). That study also made the point that about 80% of self-represented litigants reported that they could not afford an attorney. These results were especially ominous because although it was the original intent of the Congress to create a statutory scheme that would be non-adversarial, pro-claimant and veteran friendly, the reality is that a confusing, complex, bureaucracy has evolved to handle the adjudication of veterans' benefits. In fact, the adjudication of veterans' benefits claims has in many circumstances become

such an antagonistic adversarial process that as a consequence, the need for representation by competent veterans' law practitioner's has become nearly unavoidable.

The unfortunate facts are that the adjudication of veterans' claims and its administrative appeal process can take three to five years in the best of circumstances, and ten years or more in the worst. Congress now allows a veteran to retain and compensate an attorney or qualified agent to represent the veteran before the Department of Veterans Affairs, the BVA or the United States Court of Appeals for Veterans Claims. However, current law does not allow a veteran to compensate an attorney until the administrative appeal process is final and adverse through the issuance of a final BVA decision and denial of the veteran's claim. This means a veteran cannot pay his or her attorney until after the Board of Veterans' Appeals has issued a final adverse decision.

The Congress in November of 1988 passed the Veterans' Judicial Review Act. This legislation allowed - for the first time in the Nation's history, judicial review of decisions involving veterans' benefits. This law allows a veteran to appeal to a court the denial of any veteran's benefits by the Department of Veterans Affairs. The veteran may represent him or herself, pro se before the court. From the creation of the United States Court of Appeals for Veterans Claims, the pro se filing rate, meaning the veterans who filed without an attorney, has been consistently 70%. This means that seven out of ten veterans go to court without a legal representative.

Going to court without competent legal representation is like going to war unarmed. It is an unfair fight. At court for the first time the government is openly adversarial. At court the Department of Veterans Affairs is represented by the VA's General Counsel. The VA General Counsel's job is to defend the Agency and its denial of benefits in Court. The General Counsel's Office employs trained legal professionals, whose job it is to persuade the Court that the decision of the Agency was correct and should be affirmed. The General Counsel's Office will aggressively work toward that goal. A veteran, who is unrepresented before the court, is simply at a completely and totally unfair disadvantage. This is also true of the interactive processes between the VA and the veteran during the claims processing that goes on prior to the VBA activity-level has been reached.

The only way to even the playing field, and to better assure that complete, fully developed claims cases are being presented to the VA, is to afford veteran claimants with competent legal assistance early-on in the claims process. The Veterans Law Project at the North Carolina Central University School of Law provides a prototype for meeting the great need, in the manner in which those much needed legal assistance services should be made delivered.

The prototype Veterans Law Project that is now in operation in the state of North Carolina operates as a legal clinic in conjunction with the North Carolina Central University School of Law to provide legal assistance to veterans and their dependents with respect to VA claims of various types. The Veterans Law Project believes that by making legal assistance available early-on in the claims process, it significantly reduces the VA's case load by reducing the front-end effort needed to process a claim to reviewing and developing the evidence, considering legal and factual arguments and analysis, and rendering a decision. Also, by improving the

completeness and quality of the veterans original claim submission, it will significantly reduce the number of remanded cases.

The Veterans Law Project does not seek to displace the VSOs (County-level or those Veteran's Service Organizations like the VFW) in providing representation to veterans. The veterans claims process system within the VA would be best served if veterans had the freedom to - and a readily available resource from which to - seek legal assistance at no-cost to themselves.

As to the argument that veterans should be protected from unethical or inexperienced attorneys, the practice of law is now regulated in terms of ethics, fees and professional responsibilities. Currently, the VA has capped attorney fees in all post-BVA decision cases at 20% of recovered benefits. Veterans Law Project personnel who assist VA claimants at an earlier stage of the proceedings are prohibited from charging fees and are not entitled to any portion of recovered benefits.

The prototype Veterans Law Project operates as a legal clinic under the supervision and mentorship of a Director, who has experience in dealing with the VA. This Director is the Supervising Attorney and also an Adjunct Law Professor who teaches veterans law. In addition to the Supervising Attorney, law students from the North Carolina Central School of Law and the University of North Carolina, Chapel Hill perform many services in support of the Veterans Law Project.

The Veterans Law Project fills an existing need for legal assistance to help veterans get their initial claims developed in such way that they have an increased probability of favorable adjudication, and also to assure that, the claims are properly constituted if eventual judicial review at the United States Court of Appeals for Veterans Claims level, or at United States Court of Appeals for the Federal Circuit is needed.

Participating law students assist with the screening of files and sorting incoming claims and documents necessary for claims development, interview veterans as to the validity of their claims, assist veterans with the technical aspects of filing their claims, perform legal research, prepare supporting legal briefs, help a claimant file all applicable forms, assure that the initial development of a claim is completed within the time limits imposed by the VA, and perform whatever other tasks are required to successfully move the veterans' claims through the related adjudication process. The level of legal training necessary to render this assistance is reached by law students with a modest amount of legal training that is presented through weekly classes at the Law School. These participating students receive credit for clinical study under arrangements between the clinic and the University's School of Law.

In addition to helping veterans to develop their claims, the law students also assist in ordering further medical examinations, when needed, and in assuring that the VA performs its broadened duty to assist veterans in the development of their claim required both by the Veterans Claims Assistance Act of 2000, and case law.

Prior to filing an appeal with the Board of Veterans Appeals, which is staffed solely by VA attorneys, the students assist with the filing of a Notice of Disagreement with an adverse VA

rating decision, after which a statement of the case is issued by the VA explaining the rationale for the VA rating decision. Thereupon an appeal to the Board of Veterans Appeals can be properly filed with the assistance of the law students under the guidance of the Veterans Law Project.

## **HR 1435 - PROPOSED LEGISLATION FOR A PILOT PROGRAM TO REDUCE THE BACKLOG OF CLAIMS FOR BENEFITS PENDING WITH THE DEPARTMENT OF VETERANS AFFAIRS**

The VA has seen over 200,000 veterans from Operation Enduring Freedom / Operation Iraqi Freedom, which is less than half of the total number of the veterans who have been separated from active duty. This number can only increase, especially with the numbers of those serving overseas increasing. Over the course of time a very large percentage of these veterans will, at some point, become claimants for service-connected disabilities associated with causes for which they are now only receiving medical care and or treatment. Claims for disability filed with the VA will only increase over the course of the next two decades – even if there is not another similar major military engagement during that period.

We who are involved with the Veterans Law Project feel that we must do everything we can to assure that these men and women are properly cared for and that their claims for service-connected disability compensation are quickly and fairly evaluated and processed. The cost of providing responsive claims evaluation and processing is part of the ongoing costs of the Global War on Terrorism. The costs associated with fulfillment of the national obligation to veterans for their service is any aspect of this mission of which the Committee and this subcommittee is a part. The Veterans Law Project believes that ultimate passage of HR 1435 is consistent with that responsibility.

Reports indicate that around 60,000 recently separated service-members have been diagnosed with some form of mental problems by the VA, and almost 40,000 of these men and women have been diagnosed with PTSD. It's true: nobody goes to war and returns the same person. Veterans' claims for service-connected disability related to brain-trauma, a relatively new basis for claims, mental health problems, and the forecast increase in PTSD diagnoses is an area of claims processing in which the VA is relatively inexperienced. The case load in these areas will greatly increase over the next 10 years. While the VA is making substantial progress in these areas, improvements must be made; and additional capacity to handle claims of this specialized nature must be added.

The last time we looked into it, the VA had over 800,000 individual claims and appeals for compensation, pension, and education benefits. This is a massive backlog of claims, which has resulted in six-month waits for initial ratings decisions on compensation claims. We at the Veteran's Law Project initiative feel that this is unacceptable.

About 600,000 of those claims are for disability compensation. Any delay in providing benefits to these wounded service-members makes it difficult for them to provide for themselves and their families. Further, because access to the VA health care system is curtailed for many

veterans without compensable service connections, delays in compensation decisions deny these veterans the health care and treatments they need to lead productive lives.

Despite the best efforts and intents of VA managers, the backlog continues to grow, and with increasing numbers of returning veterans, it can only go up. As the number of cases on the backlog grows, the difficulty of managing the backlog and finding solutions to the systematic problems will only get worse.

The VA claims that much of the problem with the backlog has to do with the complexity of the cases. While we would acknowledge that the complexity of claims has increased, the Veterans Law Project views this as a problem of resources – both in terms of numbers and requisite skills. We feel that by enacting the “Pilot Program to Reduce the Backlog of Claims for Benefits Pending with the Department of Veterans Affairs” and embracing the Veterans Law Project concept in the states where the Pilot Program is implemented a significant, measurable, reduction in remanded claims cases will result. Veterans Service Officers from both County-level Veterans Service Offices and the Major Veterans Service Organizations, such as the Veterans of Foreign Wars (VFW), can acquire the assistance of third and four-year law students, working within the Veteran’s Law Project, who have already acquired “Paralegal” skills in assembling case files in conformance with applicable regulations and laws. With legal assistance made available to veterans early in the claims process, the VA’s task would be reduced in reviewing and developing the evidence, analyzing legal and factual arguments, and rendering decisions.

While funding new VA positions and redeploying resources freed up under the Pilot Programs could certainly direct more manpower force onto the task of reducing backlogs, working in cooperation with the various service officers and the Veterans Law Project could help the VA to do even more.

The VA’s staffing needs to be adequate to meet the demands placed upon its system. The only way that a meaningful dent in the backlog can be made to reduce the current delays is by employing more, and qualified, resources to the backlog problem – a problem that will only be exacerbated by the large influx of Operation Iraqi Freedom and Operation Enduring Freedom veterans. The size of the backlog is proof positive that this is not being done and we at the Veterans Law Project look forward to being part of the solution.

For a veteran on his or her own, trying to navigate the highly bureaucratic VA claims process can be a nightmare, and a number of veterans just give up in their efforts to prosecute their claims for service-connected disability. Denying them their earned benefits, necessary compensation, and/or access to health care for their disabilities, is not how a nation should treat its heroes.

The Veterans Law Project and its offspring can augment the programs envisioned by the “Proposed Legislation for a Pilot Program to Reduce the Backlog of Claims for Benefits Pending with the Department of Veterans Affairs” by working with various service officers and using participating law students to assist with the screening of files, sorting incoming claims and documents necessary for claims development, interviewing veterans as to the validity of their claims, assisting veterans with the technical aspects of filing their claims, performing legal research, preparing supporting legal briefs, helping claimants file all applicable forms, assuring

that the initial development of a claim is completed within the time limits imposed by the VA, and performing whatever other tasks are required to successfully move the veterans' claims through the related adjudication process.

In addition to the law students helping veterans to develop their claims, they also can assist in ordering further medical examinations when needed, and insuring that the VA applies its broadened duty to assist a veteran in the development of their claim which is required by the Veterans Claims Assistance Act of 2000, and by case law.

## **HR 67 - VETERANS OUTREACH IMPROVEMENT ACT OF 2007**

While the Veterans Law Project believes that federal, state and local governments; and VSOs; all have a heavy responsibility to reach out to eligible veterans and make them aware of the entitlements, programs, and benefits that Congress has made available for them, we feel that it is counter-productive for the Congress to make available to the various state veterans welfare agencies a program that is optional in its implementation and will almost certainly cause state legislators to become inclined to reduce their current funding authorizations for veterans programs, in light of the availability of additional federal funding. We feel that the provision in the proposed Bill which provides that the funding provided to the states cannot be used "for the purpose of administering outreach supporting funds, and are limited to no more than 50 percent of the total cost of such State and local government activities, and shall be used to expand existing outreach programs and services, not to supplant existing State and local funding" will not deter an offsetting reduction in state funding in those states that have already implemented programs.

The Veterans Law Project believes that the envisioned appropriation to support the proposed legislation, as currently offered, would be better spent in aiding veteran outreach efforts of the various Non-governmental Organization (NGO) Veterans Service Organizations (VSO) – not as direct funding support but in the form of informational packets and centrally produced ad-spots or on-line media information releases to be used as their "message" toolkits.

The single most important factor in making a veterans outreach program successful, is the ability of the program to "touch" the veteran or the veteran's family – no other entity has a more focused need to do so than the various VSO's - as membership recruiting is the impetus for their effort expenditure.

The outreach program features envisioned in this proposed legislation will be more efficiently and broadly applied and executed through use of the VSO recruiting infrastructure that already exists; it will cost taxpayers far less than the proposed alternative; and it only lacks the informational toolkit referred to earlier to effectively reach out to veterans and their families.

## **HR 1490 – PROPOSED LEGISLATION TO PROVIDE FOR A PRESUMPTION OF SERVICE-CONNECTEDNESS FOR CERTAIN CLAIMS FOR BENEFITS UNDER THE LAWS ADMINISTERED BY THE SECRETARY OF VETERANS AFFAIRS**

The Veterans Law Project fully supports the proposed legislation that would “Provide for a Presumption of Service-Connectedness for Certain Claims for Benefits under the Laws Administered by the Secretary of Veterans Affairs”. It is a fact that in the world of veteran’s claims, determining eligibility is the most difficult part of the veteran’s challenge.

To file a claim, a veteran has to satisfy two main conditions – the injury or condition for which the claim is to be made has to have occurred while in the military (service-connectedness); and a determination must be made that the injury is causing ongoing problems. It is the “Service Connectedness” that presents the real challenge for many veterans - proving something happened in the military is often very, very hard to do. Often, one piece of documentation usually can clear matters up very easily – the veteran’s DD214, which will have medals, rank, job codes and presents a fairly good history.

More often than not, obtaining the veteran’s DD-214 is impossible. In far too many instances — too many to count — none of a veteran’s papers exist anymore. In the absence of a DD-214, putting together a claim is very nearly impossible. The number of veterans’ records that were destroyed in the fire at the National Personnel Records Center in St. Louis is unknown, but clearly was very large - estimated at between 15-18 million records!

For Army personnel, it is estimated that 80% of the personnel records were destroyed for those who were discharged between November 1, 1912, and January 1, 1960. For Air Force Personnel, it is estimated that 75% of the personnel records were destroyed for those who were discharged between September 25, 1947, and January 1, 1964 (with names alphabetically after Hubbard, James E).

This records loss affects mainly those veterans of the Korean War and earlier conflicts, and early combat veterans in the Vietnam War. In many cases, even their backup records are gone as well, having been destroyed in the fire at the National Archives.

Today, as many of the subcommittee members know full-well, it is not uncommon that a veteran must enlist the aid of his or her representation in Congress in an effort to get their claim into the VA system, when there is no record of the veteran’s service except the statements of relative or friends, who are willing to give testimony that a frustrated claimant was actually a member of the armed forces.

All too often, veterans who were injured during a war or conflict don’t file claims for many years which makes proving their eligibility more difficult. The time between their service and the present makes it very problematic to establish a claim, though certain specific illnesses, such as Type II diabetes and certain cancers, are easier to prove.

Today, a few non-profit organizations exist which have dedicated their resources to assisting veterans in the filing of their claims. Thus, the Armed Forces Services Corporation (AFSC). AFSC lends assistance to veterans in proving service-connection. Their personnel are knowledgeable, and are pretty thorough in evaluating the necessary proof, and will assist the member or the surviving family member in filing the claims paperwork. The problem for most veterans is that “they simply don’t know what they don’t know”. Consequently, sources of

assistance such as the Veteran's Law Project and AFSC are of no assistance to the many veterans who can easily become befuddled by the VA's bureaucracy.

Those of us associated with the Veterans Law Project feel that a liberal broadening of the practice of presumptive service-connectedness will offer great relief to a large number of veterans who are, today, finding it nearly impossible to prosecute their claims for service-connected disabilities and illnesses.

### **HR 1444 - PROPOSED LEGISLATION TO DIRECT THE SECRETARY OF VETERANS AFFAIRS TO MAKE INTERIM BENEFIT PAYMENTS UNDER CERTAIN REMANDED CLAIMS**

The Veterans Law Project fully supports the proposed legislation that would "Make Interim Benefit Payments under Certain Remanded Claims" under the Laws Administered by the Secretary of Veterans Affairs. The proposed legislation relates specifically to claims submitted by veterans for "Compensation for Service-Connected Disability or Death"; or for claims by the dependents of veterans for "Dependency and Indemnity Compensation for Service-Connected Deaths".

While the Veterans Law Project supports the payment of interim benefits during the period in which a remanded claims case is being processed by the VA, we feel that the period of time proposed for the VA to make a decision on the matter prior to beginning of payments is too long, and simply provides yet another additional reason for delay in the payment of disability or death benefits to those veterans who are eligible. We strongly urge that this provision of the proposed Bill be changed to direct that interim payments be begun if no decision has been made by the VA after 30 days.

The VA can, and sometimes does, expedite requests for disability assistance - which is rare - usually, the only time they are willing to do so, is if extreme financial hardship or a chronic condition is involved. We feel that in cases of remands the same sense of urgency ought to be routinely followed.

In the case of disability or illness, there are already too many instances of the claimants dying before they ever receive any claims benefit payment - all too often payments for which the veteran is in dire need. The receipt of \$500.00 per month may well represent the difference between a minimal quality of life and no life at all.

We feel that the proposed provision that "if (1) the final decision the award of benefits, the amounts paid as interim benefits shall be considered to be an advance payment of benefits owed for any period before the date of such final decision (except that if the total amount of interim benefits paid is greater than the amount of retroactive benefits, the amount of the difference shall not be considered to be an overpayment for any purpose)" and (2) if "the final decision is not to award benefits, the amounts paid as interim benefits shall not be considered to be an overpayment for any purpose" are absolutely essential, given the circumstances of many of our veterans.

Those associated with the Veterans Law Project have no issue to take regarding the appropriateness of the “Effective Date” provisions of the proposed legislation.